Annual Survey of Tennessee Law

Harold Seligman

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Recommended Citation
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol11/iss4/10

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Of particular significance in this field during the survey year has been the decision of the Supreme Court of Tennessee in *Southern Bell Tel. and Tel. Co. v. Tennessee Pub. Serv. Comm'n.*\(^1\) Several aspects of administrative law are involved in this holding, including scope of review, evidence to be considered by the court on review, and the rate-making function.

In order to fully understand the decision of the court, it is necessary to have some familiarity with the history of the proceeding. In November 1954, Southern Bell Telephone and Telegraph Company (Southern Bell) filed\(^2\) with the Tennessee Public Service Commission (Commission) rates and charges designed to yield an increase in gross revenues amounting to $9,800,000 annually. The effective date of the rates was suspended by the Commission; and after a lengthy and detailed hearing, an order was entered approving an annual increase of $2,996,900.00.\(^3\) An appeal was taken under the statutory provision,\(^4\) namely, by petition of certiorari, to the Chancery Court for Davidson County. After hearing on a preliminary injunction seeking to make the original filed rates effective pending the outcome of the litigation, an amended and supplemental bill was filed, which bill was requested to be treated as an original bill, alleging confiscation\(^5\) and making application to the court for the receipt of certain additional evidence.\(^6\) Over strenuous objection, the motion was granted and the Commission ordered to receive the additional evidence, relating to certain facts and conditions which occurred following the hearing before the Commission. The chancellor in providing for the taking of such additional evidence, did so without restriction to the Commission, taking any other evidence that it might desire and further allowing the Commission the opportunity of modifying its previous findings.

The Commission initially refused the taking of this additional evi-

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\* Former General Counsel, Tennessee Public Service Commission; member, Warner & Seligman, Nashville, Tennessee.

1. 304 S.W.2d 640 (Tenn. 1957).
5. *Tenn. Const.* art. 1, §§ 8, 17, 21 and U.S. Const. amend. XIV.
dence; however, under a contempt citation to the individual commissioners, the evidence was received by the Commission and filed in the record without cross examination or proof by the interveners. The evidence introduced sought to show the results of Southern Bell's operating experience during the period following the Commission's order. Interestingly coincidental was the fact that the alleged deficiency to earn a rate of return of 6.1% which the Commission had found to be proper was the difference between the amount which was originally filed, $9,800,000, and the amount found by the Commission, $2,996,900; namely, $6,638,000. Upon final determination, relying upon the additional proof introduced, the lower court found the rates approved by the Commission to be confiscatory and because of its inability to exercise the rate-making function, the court allowed the rates as originally filed by Southern Bell to become effective. On appeal to the supreme court, the finding and decision of the lower court was affirmed.

Scope of Review: The supreme court in its decision reiterated its earlier decision on scope of review, that where the constitutional question of confiscation has been raised, under the Ben Avon rule the court will exercise its individual judgment as to both the law and the facts. The extent to which the court's "individual judgment" will be exercised has been more clearly delineated in this decision than in the prior Southern Continental case. In that case, the court stated:

The case just mentioned [Ben Avon] does so hold. While there is some intimation in the text of 42 American Jurisprudence, pages 659, 660, as we construe this text, that the Court which rendered that decision has thereafter sometimes elected not to follow it, we find no decision of that Court overruling it... We are, therefore, bound by this decision of our Federal Supreme Court.

The court continues its opinion in the Southern Continental case citing the United States Supreme Court that, while giving recognition to the validity of the Ben Avon rule:

Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency. ... [J]udicial scrutiny must of necessity take into account the entire legislative process, including the reasoning and findings upon which the legislative action rests.

7. Southern Continental Tel. Co. v. Railroad & Pub. Util. Comm'n, 285 S.W.2d 115 (Tenn. 1955); see also the same case at 301 S.W.2d 387.
11. Id. at 116.
12. Id. at 117.
This infers that the Ben Avon rule would be followed possibly to a limited extent. To the contrary, in the present case, the court states:

[W]here the question is presented as to whether or not the prescribed rates of the Commission are confiscatory this brings it to a question that is beyond legislative power and solely within the power of the Court.\(^\text{13}\)

This illuminating statement swings back to a strict interpretation of the Ben Avon rule and away from the limitations found in the St. Joseph Stockyard case\(^\text{14}\) and the case above quoted. It further points up the sharp contrast of the court’s extreme narrowness in recent pronouncements concerning the scope of review in cases arising under the statutory writ of certiorari\(^\text{15}\). It is noteworthy that in this case, the allegation of confiscation was not raised prior to a supplemental pleading filed in the chancery court; thus, the scope of review of a case already on appeal changed in mid-stream. As this particular point is developed in future cases, it will be interesting to see whether the court makes any definition as to the manner in which a constitutional issue should or could be raised. Procedurely speaking, every keen advocate presenting a case before an administrative body having regulatory jurisdiction of rates would allege confiscation so as to preserve the opportunity on appeal for a broad review by the court exercising its independent judgment rather than the very narrow review outlined for appeals by certiorari under the Hoover case.\(^\text{16}\)

**Evidence Considered by the Court on Review:** The 1953 legislature spelled out the evidence to be considered by the court on review of a decision of the Public Service Commission.\(^\text{17}\) Its pertinent parts state:

The review . . . shall be confined to the record made before the commission . . . however, that if, before the date set for hearing, application is made to the court for leave to present additional evidence going to the merits of the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceedings before the commission, the court may order that the additional evidence be taken before the commission

\(^{13}\) 304 S.W.2d at 642. (Emphasis added.)


\(^{15}\) Blue Ridge Transportation Co. v. Hammer, 313 S.W.2d 433 (Tenn. 1958); Blue Ridge Transportation Co. v. Hammer, 313 S.W.2d 431 (Tenn. 1958); Flowers v. Benton County Beer Bd., 302 S.W.2d 335 (Tenn. 1957); Hoover Motor Express Co. v. Hammer, 298 S.W.2d 724 (Tenn. 1957); Continental Tenn. Lines v. Fowler, 199 Tenn. 365, 267 S.W.2d 22 (1954); Louisville & N.R.R. v. Fowler, 197 Tenn. 268, 271 S.W.2d 188 (1954); Hoover Motor Express Co. v. Railroad Pub. Util. Comm’n, 195 Tenn. 593, 261 S.W.2d 233 (1952).

\(^{16}\) Hoover Motor Express Co. v. Railroad & Pub. Util. Comm’n, 195 Tenn. 593, 261 S.W.2d 233 (1952). The two grounds outlined are (1) whether the Commission had jurisdiction and (2) whether the Commission acted arbitrarily, illegally or fraudulently.

\(^{17}\) TENN. CODE ANN. § 65-228 (1956).
upon such conditions as the court deems proper. . . . [T]he commission may modify its findings and decisions . . . and it shall file with the court, to become a part of the record, the additional evidence . . . .

Southern Bell in its amended bill before the lower court alleged facts which happened after the proof in the record before the Commission was closed and the chancellor ordered the proof taken following the statutory provision above. When attacked on review, the supreme court said of the above act:

The probability is that the provisions of those acts were not intended to affect, one way or the other, where the question is whether or not a party's property has been unconstitutionally confiscated.\(^{18}\)

The court then declined to say whether or not the statutes were applicable. In ruling on the admissibility of the evidence, the court stated:

[W]e think that this evidence is admissible under the inherent rights of the court acting on this constitutional question.\(^{19}\)

Thereupon the court found it unnecessary to pass upon the persuasiveness of federal statutes\(^{20}\) and decisions\(^{21}\) holding that new or additional evidence cannot be presented after the close of hearing before an administrative agency. The decision obviously invalidates the pronouncement in the Hoover case\(^{22}\) which states:

Since the Tennessee statutes creating the Public Utilities Commission were modeled on the Federal statutes, Federal decisions are particularly persuasive in resolving questions arising under those statutes.\(^{23}\)

As authority for the admission of the additional evidence the court relies on a Massachusetts case\(^{24}\) which arose under a specific state

\(^{18}\) 304 S.W.2d at 645.
\(^{19}\) Id. at 645.
\(^{21}\) "[I]f either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission . . . ."


23. 261 S.W.2d at 239. See also cases cited there.

statute providing for the court to take additional evidence as it deems proper on the issue of confiscation.\textsuperscript{25}

The effect of this decision might possibly have some ramifications which are quite unsuspected. It is readily conceivable that in future cases after a proceeding has been instituted before either the administrative agency or on appeal to a court, an obvious loophole for dilatory tactics is available for flagrant abuse; for every day, week, month or intervening period of time will provide some experience which could conceivably justify the taking of additional proof and result in a complete lack of finality to such cases.

\textit{Fixing of Rates:} The Tennessee courts have consistently held that the fixing of rates is a legislative function and the court does not have the power to fix rates.\textsuperscript{26} The method employed by the court in this case to relieve the utility of confiscation is to allow the rates fixed initially by the utility to become effective and remain until the Commission initiates a new hearing. In this case, it appears that the court in its anxious desire to protect the constitutional rights of the utility has neglected to make any determination as to the possibility that the rates fixed by the utility were excessive. The statutory criteria of “just and reasonable”\textsuperscript{27} obviously has application to the rate payer as well as the utility.

Several other cases involving a phase of administrative law were decided during the survey period. In ruling upon an injunction\textsuperscript{28} to prevent an individual from engaging in the practice of dentistry, the supreme court allowed the Board of Dental Examiners and the Licensing Board for Healing Arts to maintain a suit against an individual supplying artificial teeth and concluded that under the definition of the practice of dentistry\textsuperscript{29} any person is regarded as practicing dentistry who examines and treats or supplies artificial teeth as substitutes for natural teeth. The court reinstated an injunction to prohibit the defendant in the case from engaging in the practice of dentistry, but not prohibiting him from engaging in the business of operating a dental laboratory. During the pendency of the suit, an act was passed by the legislature\textsuperscript{30} creating a State Board of Dental Examiners which would regulate the practice of dentistry; the act specifically delineates “that which does not constitute the practice of dentistry.” The decision of the court, therefore, interpreting section

\begin{itemize}
\item \textsuperscript{26}See Southern Continental Tel. Co. v. Railroad & Pub. Util. Comm’n, 285 S.W.2d 115 (Tenn. 1955); and cases cited in note 15, supra.
\item \textsuperscript{27}Tenn. Code Ann. §§ 65-518, 520. (1955).
\item \textsuperscript{28}State Board of Dental Examiners v. Rymer, 303 S.W.2d 959 (Tenn. 1957).
\item \textsuperscript{29}Tenn. Code Ann. § 63-507 (1956).
\item \textsuperscript{30}Tenn. Code Ann. §§ 63-520 to -35 (Supp. 1958).
\end{itemize}
63-507 of the Code would have little value in light of the legislative enactment.

In the case of Davis v. Allen, an attack was made against the State Board of Accountancy and the Attorney General to have a 1955 act declared unconstitutional which prescribed the qualifications for certified public accountants and public accountants and which required the payment of annual licensing fee for those qualifying under the act. While the case was brought under an allegation that the entire act was unconstitutional, the court of appeals suggests that jurisdiction of the appeal might be in the supreme court rather than in the court of appeals under the provisions of section 16-408 of the Code. The court immediately resolved the question in favor of its own jurisdiction because of the question raised of the appellant’s right to question the act itself. In reality, therefore, the court of appeals itself determined that which is basically a constitutional question but rendered its decision on an interpretation of the wording of the act. The court reiterated that a person can attack an act only if it affects him adversely but since the appellant obtained a certificate as a public accountant, he had standing to attack a portion of the act, though not the act in its entirety.

One statement of the court in its decision is puzzling as regards the right of an individual to attack an act. The court states:

We also agree that since appellant does not claim any right as a “certified public accountant” and since it appears that after filing the bill he obtained a certificate as a “public accountant” under this act, he cannot attack its provisions as to these matters.

Thus the question is raised as to whether the appellant in this cause would have been denied the right to bring this suit had he not obtained his certificate as a public accountant.

Cases are well settled that a state under its police power may pass laws which exact requisite degree of skill and learning of a person in professions or of one holding himself out to the public. Nor is any difficulty encountered in the requirement of license fees.

31. 307 S.W.2d 800 (Tenn. 1957).
32. Certiorari denied by supreme court, Dec. 6, 1957.
34. The act was alleged to deprive complainant of rights guaranteed by the 5th and 14th amendments of the United States Constitution and article 1, sections 8 and 17 of the Tennessee Constitution.
35. Hicks v. Rhea County, 189 Tenn. 383, 387, 225 S.W.2d 544, 546 (1949).
36. 307 S.W.2d at 802.
In the case of *Johnson v. City of Jackson*, a school teacher was discharged for alleged mistreatment of students and failed to appeal to the city board of commissioners within the three day period required under the private act creating a city school system. The school teacher's suit is to recover salary which she alleged to be due for the academic year by virtue of her re-election by the school board.

The chancellor found in favor of the teacher and awarded her judgment under a contractual right. The school board appealed. The court in determining the cause found that the contract was incidental and the question on appeal was whether or not the teacher was legally discharged. In concluding that the city school board acted within the framework of the creating act and that an appeal within the three day period was not seasonably made, the court found no arbitrary or unfair action and held the discharge reasonable. Thereupon, the court reversed the judgment entered in favor of the school teacher. The court determined that the city officials acted in a fair manner concerning the teacher's discharge and, since she failed to appear within the requisite three days after her dismissal or within the three days after her request for reinstatement to the city commissioner, her right to appeal the discharge became final. While the court observed that the letter notifying the teacher did not expressly state her right to defend herself and although she appeared before the superintendent and the commissioner at an unsuccessful hearing, the court found she was not prejudiced and there was no suggestion that the school officials acted arbitrarily or unfairly. It would appear that the court sought to justify its end result through a very strict interpretation of a section of the private act creating the city of Jackson school system.

In *Flowers v. Benton County Beer Board*, the license of a beer permit holder was revoked by a county beer board due to the holder's plea of guilty to driving an automobile while under the influence of an intoxicant in another county. The court in its decision reiterated numerous holdings that quarterly courts, beer boards and other agencies have a very wide discretion in the issuance and the revocation of beer permits under the statutory provisions and further followed its limited scope of review of subject agencies and boards. The decision of the case turns on the point that driving an automobile

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41. 302 S.W.2d 335 (Tenn. 1957).
42. See Bragg v. Boyd, 193 Tenn. 507, 246 S.W.2d 575 (1952); Sowell v. Red, 192 Tenn. 681, 241 S.W.2d 775 (1951); Putnam County Beer Board v. Speck, 184 Tenn. 616, 201 S.W.2d 991 (1947).
43. TENN. CODE ANN. § 57-209 (1956).
44. See note 15 supra.
under the influence of an intoxicant is not an act involving moral
 turpitude and there is no evidence in the record to show a violation
 in connection with the operation of the business establishment selling
 beer in Benton county. A question of the court's awarding of the
decision is left in the statement:

Quarterly Courts, Beer Boards and other agencies of the court have
a very wide discretion in the matter of issuing permits to sell beer, and
to revoke such permits.45

This would appear to be a misstatement to the extent that the quar-
terly courts, beer boards, etc., are agencies of the court, as there is
obviously no relation between legislative-administrative and judicial
functions.

In Real Estate Comm'n v. McLemore,46 the license of a real estate
broker was revoked by the Real Estate Commission and a petition for
certiorari seeking a trial de novo filed. The supreme court held that
the petition before the circuit court was insufficient for the issuance
of writ of certiorari at common law or under the statute for the reason
that the petition did not contain a statement of the facts or circum-
stances, which show a probability of innocence, upon which the
circuit judge might have exercised his discretion in the issuance of
the writ. The court cites Hoover Motor Express Co. v. Railroad &
Pub. Util. Comm'n47 stating there was no allegation that the Real
Estate Commission was acting illegally or in excess of its jurisdiction.
On petition to rehear, McLemore insisted that he was entitled to
certiorari as a matter of right because he was dissatisfied with the
hearing before the board. The court overrules the petition to rehear
stating:

The right of appeal is not fixed by our Constitution further than to
insure that the Supreme Court shall have the right of supervisory review
over all inferior tribunals. Every man has a right to his day in Court,
that is to have a hearing after due notice, but it by no means follows that
he has a right to have the first hearing reviewed by a higher Court.48

In conclusion, the court generally seems to have maintained a very
narrow review of the decisions of administrative agencies in almost
every instance with the exception of those involving the constitutional
issue of confiscation. From this survey year, it appears that the court
has reached almost the two extremes of review on such; while perhaps,

45. 302 S.W.2d at 338. (Emphasis added.)
46. 306 S.W.2d 683 (Tenn. 1957).
47. 195 Tenn. 593, 261 S.W.2d 233 (1952).
48. 306 S.W.2d at 688. The court cites Ex parte Abdu, 247 U.S. 27 (1918).
In contrast note Tenn. Code Ann. § 65-220 (1956), providing for review by
certiorari of any party aggrieved of an order of the public service commission
some tendency toward reaching a middle ground would be in the public interest. There even appears to be some indication of a trend being developed in those cases of certiorari review that the court, rather than looking for any material or substantial evidence to uphold the administrative agency's decision, looks for a mere scintilla of evidence.